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No. 91-1749

Supreme Court, U.S.
FILED
JUN 15 1992
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

October Term, 1991

M. HISHAM TARABISHI, M.D.,
Petitioner,

v.

MCALESTER REGIONAL HOSPITAL, also known as McAlester Regional Health Center Authority Public Trust Status; THE MCALESTER CLINIC, INC.; LEROY M. MILTON, M.D.; GEORGE BROWN, M.D.; WILLIAM G. BLANCHARD; SAMUEL E. DAKIL, M.D.; JOHN B. COTTON, M.D.; STEVEN ATWOOD, M.D.; CHARLES K. HOLLAND, M.D.; KARL SAUER, M.D.; HERTZL V. SCHAFF, M.D.; JOE MCCAULEY, M.D.; and, DON SCHULLER, M.D.,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITIONER'S SUPPLEMENTAL BRIEF

John A. Claro
CLARO & CLARO
6305 Waterford Blvd., Suite 410
Oklahoma City, OK 73118
Telephone: (405) 843-4074
Attorney for Petitioner

June 15, 1992

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Busey and Freeman, *The View from the Summit: Jurisdiction and Beyond*, 60 Antitrust L. J. 725 (1992) 1

Pursuant to Supreme Court Rule 15.7, the following is proffered as a supplement to the original Petition for Writ of *Certiorari* filed herein.

The importance of this Court providing guidance to lower courts on the application of the *per se* rule to peer review cases, the very question presented by this Petition, was demonstrated by the authors of a recent article appearing in the *Antitrust Law Journal*. See Busey and Freeman THE VIEW FROM THE *SUMMIT*: JURISDICTION AND BEYOND, 60 Antitrust L. J. 725 (1992). There, in their discussion of *Summit Health, Ltd. v. Pinhas*, 111 S.Ct. 1842 (1991), the authors observed:

> "[T]he exchange about the appropriate jurisdictional test in *per se* cases may have other implications.... The Court may have raised the spectre of a *per se* rule in *Summit* without providing any clear analysis or justification, thus adding to the confusion in the lower courts concerning the applicability of the *per se* rule in boycott cases in general and in peer review cases in particular.[142]
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> Fn. 142. *Cf. Shafi v. St. Francis Hospital*, 937 F.2d 603 (4th Cir., 1991) (Based upon *Summit* court remanded physician boycott case previously dismissed on motion for summary judgment for failure to identify and prove relevant market or adverse effect on competition.)

Id., 60 Antitrust L. J. 750 (1992)

It is noted that the Tenth Circuit, in its opinion below, analyzed the same elements and reached precisely the opposite conclusion. It affirmed a judgment for defendants based upon insufficient proof of relevant market and inadequately demonstrated effect on competition flowing from the peer review boycott of Dr. Tarabishi. The Tenth Circuit opinion did not directly

discuss the issue of the *per se* rule, however, even though it was duly presented for review in the original memoranda of appellant, below, and was the specific, and only topic addressed in appellant's Petition for Rehearing. The fact that the defendants' "peer review without due process" served to eliminate the only competing ear, nose and throat doctor in McAlester, Oklahoma, was ignored except for a brief, tangential reference in a footnote declining to apply the *per se* rule for undisclosed "public policy" reasons. The trial court noted that "precedent in this area" was "in flux".

A clear ruling on the question by the United States Supreme Court would benefit the lower courts who will have to continue to deal with the issue of what legal consequence attends anti-competitive conduct disguised as peer review. Such guidance would be particularly helpful, today, where highly publicized pressure to cut health care costs (thereby lessening available revenues for hospitals and physicians) provides an economic incentive to utilize peer review to eliminate competitors for the remaining health care dollar.

Respectfully submitted,

John Anthony Claro
Attorney for Petitioner
M. Hisham Tarabishi, M.D.

John Anthony Claro
CLARO & CLARO
6305 Waterford Blvd., Suite 410
Oklahoma City, OK 73118
Telephone: (405) 843-4074